No. 95-2009

(2)

Supreme Court, U.S.
FILED
JUL 15 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ROGER W. PIPKIN, III,
Petitioner,
v.

MORTGAGE CREDITCORP, INC.,
WESTMARK MORTGAGE CORPORATION,
MIDLAND MORTGAGE CO., MIDFIRST BANK
S.S.B., NORTHWEST BANK,
Respondents.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION,
Third-Party Defendant, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MIDLAND MORTGAGE CO., MIDFIRST BANK S.S.B. AND NORTHWEST BANK

JAMES P. LINN
B.J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102-4289
(405) 239-6781
Attorneys for Respondents Midland Mortgage Co., Midfirst Bank S.S.B. and Northwest Bank
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

QUESTIONS PRESENTED

This case involves an effort by the holder of a Texas state court default judgment to execute on property which his judgment debtor never owned. The questions presented are:

(1) Whether, as a matter of Oklahoma or Texas law, a judgment lien can encompass property which the judgment debtor did not beneficially own at the time the judgment was entered?

(2) In the event the law of either State might grant such extraordinary effect to a judgment lien, is the relevant state law preempted by § 301(g) of the National Housing Act (12 U.S.C. § 1721(g)) to the extent state law would preclude or limit the rights granted to the Government National Mortgage Association ("GNMA") in connection with its ownership and administration of mortgages and related obligations issued under the Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	3
Proceedings Below	3
The MBS Program	4
REASONS FOR DENYING THE WRIT	6
I. THE UNPUBLISHED OPINION OF THE COURT OF APPEALS IS CLEARLY CORRECT AND PRESENTS NO ISSUE WARRANTING FURTHER REVIEW	6
II. PETITIONER WOULD NOT BE ENTITLED TO REVERSAL OF THE JUDGMENT BELOW EVEN IF STATE LAW WAS NOT PREEMPTED BY FEDERAL LAW	8
A. Oklahoma Law	8
B. Texas Law	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Buell Cabinet Co. Inc. v. Suddeth, 608 F.2d 431 (10th Cir. 1979)	10
Consolidated Mortgage & Finance Corp. v. Landrieu, 493 F. Supp. 1284 (D.D.C. 1980)	6
Dandridge v. Williams, 397 U.S. 471 (1970)	8
Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 139 (1982)	7
First of Denver Mortgage Investors v. Riggs, 692 P.2d 1358 (Okla. 1984)	9
First State Bank of Amarillo v. Jones, 183 S.W.2d 874 (Tex. 1916)	7
Free v. Bland, 369 U.S. 663 (1962)	7
Gibralter Savings Association v. Martin, 784 S.W.2d 555 (Tex. App.—Amarillo 1990, writ denied)	11
J.I. Case Threshing Machine Co. v. Walton Trust Co., 39 Okla. 748, 136 P. 769 (1912)	7, 9
Kennedy v. Roff, 178 Okla. 71, 61 P.2d 1044 (1939)	10
Longfalls Realty Co. v. Anchor Electric Co., 405 S.W.2d 170 (Tex. Civ. App.—Dallas 1966, no writ)	11
Lunn v. Kellison, 64 Okla. 168, 153 P. 1136 (1916)	10
Texas American Bank v. Resendez, 706 S.W.2d 343 (Tex. App.—Amarillo 1986, no writ)	11
United States v. Union Central Life Insurance Co., 368 U.S. 291 (1961)	7
Statutes-Federal	
12 U.S.C. § 1717	4
12 U.S.C. § 1721(g)	2
Statutes-State	
12 O.S.A. § 706	2
12 O.S.A. § 721	3
Texas Property Code § 13001(a)	2
Constitutional Provision	
U.S. Const. Art. VI, Clause 2	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-2009

ROGER W. PIPKIN, III,
Petitioner,

v.

MORTGAGE CREDITCORP, INC.,
WESTMARK MORTGAGE CORPORATION,
MIDLAND MORTGAGE CO., MIDFIRST BANK
S.S.B., NORTHWEST BANK,
Respondents.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION,
Third-Party Defendant, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS MIDLAND MORTGAGE CO., MIDFIRST BANK S.S.B. AND NORTHWEST BANK

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. Art. VI, Clause 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State

shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. 12 U.S.C. § 1721(g), provides in pertinent part:

The Association is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of the Association, subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. No state or local law, and no federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980) shall preclude or limit the exercise by the Association of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights as provided in the preceding sentence, in the mortgages constituting the trust or pool against which the guaranteed securities are issued.

3. Texas Property Code § 13001(a) provides:

A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.

4. 12 O.S.A. § 706 provides in pertinent part:

A. Creation of Lien. A judgment to which this section applies shall be a lien on the real estate of the

judgment debtor within a county only from and after a Statement of Judgment made by the judgment creditor or his attorney, substantially in the form prescribed by the Administrative Director of the Courts, has been filed in the office of the county clerk in that county.

* * * *

2. A lien created pursuant to this section shall only affect the real estate of judgment debtors whose names appear in the Statement of Judgment.

5. 12 O.S.A. § 721 provides in pertinent part:

A copy of any foreign judgment authenticated in accordance with the applicable Act of Congress or of the statutes of this state may be filed in the office of the court clerk of any county of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a district court of this state and may be enforced or satisfied in like manner. Provided, however, that no such filed foreign judgment shall be a lien on real estate of the judgment debtor until a certified copy of the judgment so filed is also filed in the office of the county clerk in the county where the real estate is located.

STATEMENT

Proceedings Below

Petitioner is the holder of a default judgment obtained in Texas state court against two defunct non-parties, Mortgage Creditcorp, Inc. and Westmark Mortgage Corporation (collectively the "Westmark parties"). Prior to 1989, the Westmark parties had been "issuers" and "servicers" of real estate mortgages guaranteed by the Government National Mortgage Association ("GNMA").

On October 30, 1989, the Westmark parties defaulted on their obligations to GNMA. GNMA then declared the

Westmark parties in default. Thereafter, Midland Mortgage Co., Midfirst Bank S.S.B. and Northwest Bank (collectively the "Midland parties") contractually assumed the servicing obligations previously performed by the Westmark parties.

According to petitioner, in 1994 he obtained a judgment against the Westmark parties (which no longer existed) for the alleged failure of the Westmark parties to provide petitioner with a lien-free house. Petitioner's default judgment was for approximately $5 million. Neither GNMA nor the Midland parties were parties to petitioner's Texas state court proceeding nor were GNMA or the Midland parties alleged to have been involved in the conduct giving rise to the judgment.

Petitioner thereafter sought to execute on his judgment in Oklahoma (the location of the Midland parties) by serving writs of execution on the Midland parties seeking "goods and chattels" of the Westmark parties, i.e., the promissory notes and accompanying mortgages which the Westmark parties had formerly serviced for GNMA. The Midland parties obtained a stay of the writs of execution and filed a petition in intervention in Oklahoma state court joining GNMA as a necessary party. GNMA then removed the action to the United States District Court for the Western District of Oklahoma.

The district court granted motions for summary judgment in favor of the Midland parties and GNMA and dismissed the Midland parties third-party complaint against GNMA as moot. The Court of Appeals for the Tenth Circuit, in an unpublished *per curiam* opinion, affirmed.

The MSB Program

GNMA is a government corporation located within the Department of Housing and Urban Development (12 U.S.C. § 1717). GNMA administers the Mortgage-Backed Securities ("MBS") program pursuant to 12 U.S.C. § 1721(g). The goal of the program is to attract capital

into the secondary market for moderate income home loans, thus increasing the availability of low income housing in the United States.

Under the MBS program, GNMA authorizes private entities ("issuers" and "servicers") to issue securities backed by large groups or "pools" of home mortgages which are insured or guaranteed by agencies of the federal government such as the Federal Housing Administration or the Department of Veterans Affairs. The securities are sold to private investors and the sale proceeds are used to provide funds for mortgage loans. The issuers then service the securities and the mortgages collateralizing those securities. This includes such routine tasks as collecting monthly mortgage payments from mortgagors and using the funds to make the appropriate payments to securities holders.

Pursuant to 12 U.S.C. § 1721(g), the full faith and credit of the United States is pledged to guarantee timely payment of principal and interest to the securities holders. This, of course, makes the securities an appealing investment for millions of private investors. On the other hand, it exposes the government to potentially enormous liability if the issuers do not make the required payments.[1]

Because of the size and scope of the MBS program, GNMA does not attempt to itself administer all aspects of the program. Instead, GNMA contracts with private banks and mortgage lending institutions to serve as "issuers" and/or "servicers" of designated pools of mortgages within the MBS program. The Midland parties perform these services for GNMA with regard to the promissory notes and accompanying real estate mortgages which petitioner sought to seize.

The evidence—undisputed in the district court and unchallenged in the court of appeals—established that GNMA issuers are always required to enter into standard-

---

[1] According to 2 Nelson & Whitman, *Real Estate Finance Law*, Sec. 11.3 at p. 76 (3d ed. 1993) GNMA's mortgage guarantees aggregated $63 billion in 1991, alone.

ized contracts with GNMA. GNMA's contracts require its issuers or servicers to convey to GNMA all rights in the pool of mortgages and the promissory notes which the mortgages secure. However, to simplify the issuer or servicer's tasks in administering the mortgages and accompanying promissory notes (sending monthly statements to mortgagors, initiating foreclosure actions, etc.) the issuer or servicer retains nominal legal title to the mortgages and records them in its name. *See*, e.g., *Consolidated Mortgage & Finance Corp. v. Landrieu*, 493 F. Supp. 1284, 1287 (D.D.C. 1980). Even this nominal legal title to the promissory notes and mortgages is extinguished the moment GNMA notifies an issuer or servicer that it is in default on any obligation which it has undertaken on behalf of GNMA. 12 U.S.C. § 1721(g)(1). Such a notice of default constitutes "extinguishment" of all legal or equitable title or interest of the issuer in any pooled mortgage and, at that time, the mortgages again become "the absolute property of [GNMA] . . . ." *Id.* Pursuant to the statute, "no state or local law" can "preclude or limit" GNMA's contractual authority with its issuers or its absolute ownership rights "in the mortgages constituting the trust or pool. . . ." *Id.*

GNMA issued its notice of default to the Westmark parties in 1989, more than five years before Pipkin asserts he obtained his *in absentia* judgment against those parties.

REASONS FOR DENYING THE WRIT

I. THE UNPUBLISHED OPINION OF THE COURT OF APPEALS IS CLEARLY CORRECT AND PRESENTS NO ISSUE WARRANTING FURTHER REVIEW.

The explicit statement of federal preemption found in 12 U.S.C. § 1721(g) is as clear as the English language permits:

> No state or local law . . . shall preclude or limit the exercise by [GNMA] of . . . its ownership rights . . . in the mortgages. . . .

As the courts below correctly held, to the extent local Texas law might impair GNMA's absolute ownership rights in the pooled mortgages in question, that local law is, beyond question, preempted by § 1721(g). Similarly, to the extent local Texas law might require GNMA—or private parties acting on behalf of GNMA—to record in local property records notices of default, assignments of mortgages or the like, that local law would have the effect of preclud[ing] or limit[ing] the exercise by [GNMA] of . . . its ownership rights . . . in the mortgages . . ." and is, equally, preempted.

The opinion below, in so holding, created no conflict with any decision of any other court of appeals and is not even arguably in tension with any decision of this Court. Quite the contrary. *See*, e.g., *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 139, 158-59 (1982) (federal regulations concerning due-on-sale clauses in mortgages issued by federally created savings and loans preempted contrary provisions of state law); *United States v. Union Central Life Insurance Co.*, 368 U.S. 291, 296 (1961) (Michigan statute authorizing the filing of a federal tax lien notice only if it contained a description of the liened property preempted by contrary federal regulations). *See also, Free v. Bland*, 369 U.S. 663, 666 (1962).

As a matter of the law of either Texas (*First State Bank of Amarillo v. Jones*, 183 S.W.2d 874, 876 (Tex. 1916)) or Oklahoma (*J.I. Case Threshing Machine Co. v. Walton Trust Co.*, 39 Okla. 748, 748 P. 769 (1912)), petitioner, as a judgment creditor of the Westmark parties, could only execute on property actually owned by the Westmark parties at the time judgment was entered. The Westmark parties never beneficially owned the promissory notes and accompanying mortgages here in question and even nominal legal title had been absolutely extinguished by GNMA under section 1721(g) more than five years before petitioner obtained his judgment.

II. PETITIONER WOULD NOT BE ENTITLED TO REVERSAL OF THE JUDGMENT BELOW EVEN IF STATE LAW WAS NOT PREEMPTED BY FEDERAL LAW.

The courts below resolved this litigation against petitioner by holding that the Texas recording statute upon which petitioner relies, Tex. Prop. Code § 13.001(a), was preempted by the express language of 12 U.S.C. § 1721(g) insofar as GNMA and GNMA's servicers—the Midland parties—are concerned. That holding is unexceptionable. In addition, however, review in this Court is unwarranted because petitioner's attempt to obtain a writ of execution against the promissory notes and mortgages in question would fail as a matter of Oklahoma or Texas state law.

Mr. Pipkin's petition for review in this Court assumes without discussion that he possesses the rights of a Texas state law judgment creditor and that, as a matter of Texas law, he would be entitled to a writ of execution against the promissory notes and real estate mortgages serviced for GNMA by the Midland parties. Both assumptions are erroneous. While the courts below did not find it necessary to decide these points, they were briefed and argued in both courts by GNMA and the Midland parties and are properly presented here as alternative grounds for denying review of the judgment below. *See*, e.g., *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (the "prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the [lower] court").

A. Oklahoma Law.

The Midland parties all have their principal place of business in Oklahoma and the promissory notes and mortgages upon which Pipkin seeks a writ of execution are located there. Accordingly, Pipkin registered his default judgment in Oklahoma pursuant to the Uniform Enforcement of Foreign Judgments Act, enacted in Oklahoma as

12 O.S.A. § 719 *et seq.* When petitioner did so, the Texas judgment became entitled to "the same effect . . . as a judgment of a district court of [Oklahoma] and [could] be enforced or satisfied in like manner." 12 O.S.A. § 721. Thus, petitioner's "filing of a Texas judgment pursuant to the Uniform Act gave [him] 'the same rights [he] would have had had the judgment been that of a [district court of Oklahoma]'." *First of Denver Mortgage Investors v. Riggs,* 692 P.2d 1358, 1362 (Okla. 1984) (citations omitted). Pipkin's status as the equivalent of an Oklahoma judgment lien holder is fatal to his attempt to execute on the promissory notes and mortgages here at issue. This is so because Pipkin's only judgment debtor was Westmark. And, many years before Pipkin obtained his judgment against Westmark, GNMA had become the "absolute owner" of the notes and mortgages in question by operation of the relative provisions of GNMA's enabling act. *See,* 12 U.S.C. § 1721(g).

Petitioner complains that GNMA did not record its ownership in local Texas real property records. Under Oklahoma law, however, the lack of recordation is utterly irrelevant because petitioner is a mere judgment lien holder, not a bona fide purchaser or third-party creditor for value.

As long ago as *J.I. Case Threshing Machine Co. v. Walton Trust Co.,* 39 Okla. 748, 136 P. 769 (1912) the Oklahoma Supreme Court held:

> The lien of a judgment attaches only to the interest in real estate owned by the judgment defendant; judgment creditors are not bona fide purchasers. Such creditors part with nothing to acquire the lien . . . . The judgment lien . . . is a lien only on the actual interest of the judgment debtor, whatever that may be. *Therefore, though the judgment debtor may appear to have an interest as a matter of record, if he has none in fact, no lien can attach.* (emphasis supplied).

Accord, e.g., *Lunn v. Kellison*, 64 Okla. 168, 153 P. 1136 (1916); *Kennedy v. Roff*, 178 Okla. 71, 61 P.2d 1041 (1939).

Both the federal district judges resident in Oklahoma and the Tenth Circuit have repeatedly applied this fundamental principle of Oklahoma law. *See*, e.g., *Buell Cabinet Co. Inc. v. Suddeth*, 608 F.2d 431, 435 (10th Cir. 1979) ("under Oklahoma law . . . the recording statutes exist to protect bona fide purchasers . . . not judicial lien holders.")

Petitioner had only the rights which an Oklahoma judgment creditor would have had under the same circumstances. An Oklahoma judgment creditor could have had no enforceable lien upon any promissory notes or mortgages which Westmark did not in fact own at the time the judgment lien came into existence, regardless of the state of record title. Therefore, petitioner could have acquired no such right.

B. Texas Law.

The Midland parties believe that the opinions of the courts below are sufficient to demonstrate that all rights of mortgagees, assignees or other holders of interests in promissory notes or mortgages which are a part of GNMA's MBS program are controlled exclusively by the terms of 12 U.S.C. § 1721 and that any conflicting provision of the law of any state has been expressly preempted by Congress. The Midland parties also believe we have shown above that, to the extent the law of any state may be relevant, it is the law of Oklahoma—under which petitioner's attempt to obtain a writ of execution against promissory notes or mortgages serviced by the Midland parties would fail.

In addition, however, review should be denied in this Court for the independent reason that an examination of relevant Texas law demonstrates petitioner's claim would also fail under the law of that state. Petitioner places exclusive reliance upon a single sentence in a single

statute. Section 13.001(a), Tex. Prop. Code. The section states in its entirety:

> A conveyance of real property or an interest in real property or a mortgage or a deed of trust is void as to a creditor or a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or approved and filed for record as required by law.

While the Texas statute petitioner relies upon is peculiar in its wording, the Texas courts have uniformly limited its operation to an "unrecorded *deed* executed by [a] judgment *debtor*", *Gibraltar Savings Association v. Martin*, 784 S.W.2d 555, 557 (Tex. App.—Amarillo 1990, writ denied), or a similar written instrument conveying a present interest in real estate. *Texas American Bank. v. Resendez*, 706 S.W.2d 343, 346 (Tex. App.—Amarillo 1986, no writ).

Texas courts have also construed section 13.001(a) as being strictly limited to

> the actual interest which the judgment debtor has in the estate at the time the judgment lien arises. The rationale . . . is that the judgment lien holder is not in any sense an innocent purchaser. 'If [the judgment lien holder's] lien fails to attach, he loses nothing. His judgment still remains unimpaired in its full amount. In such a case, [failure to record an assignment of a mortgage] has not resulted in any injury to the judgment creditor.' *Resendez, supra* (citations omitted).

Accord, Longfalls Realty Co. v. Anchor Electric Co., 405 S.W.2d 170, 173 (Tex. Civ. App.—Dallas 1966, no writ) (holder of unrecorded assignment of mortgage has priority over holder of recorded judgment lien).

In sum, petitioner could not obtain a writ of execution against the promissory notes and mortgages owned by GNMA and serviced by the Midland parties under either

Oklahoma or Texas law relating to the rights of judgment lien holders without regard to the question of federal preemption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES P. LINN
B.J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102-4289
(405) 239-6781
Attorneys for Respondents Midland Mortgage Co., Midfirst Bank S.S.B. and Northwest Bank

July 15, 1996

* Counsel of Record